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September 26, 1996

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RECEIVED

SEP 26 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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Re: *Documents provided to peer review panel relating to DARS pioneer's preference (IB Docket No. 95-91; GEN Docket No. 90-357; PP-24; PP-86; PP-87)*

Gentlemen:

On behalf of Digital Satellite Broadcasting Corporation ("DSBC"), we are writing in response to the Commission's letter of September 20 to the peer review panel forwarding some -- but not all -- of the materials that DSBC requested be forwarded to the panel in a September 13 letter to the Commission. In addition, we respond to the September 17 letter submitted to the Commission by CD Radio, through its counsel, objecting to DSBC's September 13 request.

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In its letter, CD Radio objected to any materials being forwarded to the panel that were not previously part of the record in this proceeding -- specifically, DSBC's September 13 letter and the attached statement of Melvin Barmat. The Commission staff apparently agreed with CD Radio's objection, submitting to the panel only those documents that previously had been filed in this proceeding. The Commission made no mention in its cover letter to the panel that additional documents were being withheld.

Unbeknownst to DSBC, on September 13 (the same day that DSBC submitted its request), CD Radio submitted a virtually identical request to the Commission.¹ CD Radio asked that five documents be forwarded to the panel. While three of these documents had previously been placed in the FCC's record, two of the requested documents -- copies of CD Radio patents -- were *not part of the record* in this proceeding.² The next day (a Saturday), the Commission staff forwarded all five documents to the peer review panel -- *including the two documents submitted by CD Radio that were not part of the record in this proceeding*. The documents were accompanied by a cover letter from Commission staff counseling the panel on the weight to be accorded a patent in a pioneer's preference proceeding.

Three days after the Commission forwarded CD Radio's new documents to the panel, CD Radio filed its opposition to DSBC's request. CD Radio's September 17 letter opposing DSBC's request omits any mention of CD Radio's virtually identical request. Instead, CD Radio blithely contends that forwarding the requested documents

¹ CD Radio did not serve DSBC with this document. *DSBC urges the Commission to clarify precisely what ex parte rules apply to the pioneer's preference portion of the DARs proceeding.* Different interpretations of the rules by the various parties are creating inequities. For example, because DSBC served all parties with a copy of its September 13 letter, CD Radio had the opportunity to file in opposition. In addition, CD Radio had ample time to file its opposition because the Commission did not act on DSBC's request for a full week. In contrast, CD Radio did not serve DSBC with a copy of its request, and the Commission acted on CD Radio's request the next day, well before DSBC was able even to obtain a copy let alone file any response with the Commission.

² CD Radio attached to the other three documents copies of the cover letters that had accompanied the documents when they initially were submitted to the FCC. No such letters accompanied the patents. We have no knowledge of, nor have we found copies of, these documents in the FCC record in any of the above-captioned proceedings.

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"would make a mockery of Commission processes."³ Yet CD Radio does not explain -- because it cannot -- how forwarding its new documents did not likewise "make a mockery of Commission processes."⁴

The Commission's decision to forward to the panel only some of the documents requested by DSBC is directly at odds with its handling of a virtually identical request by CD Radio. By acquiescing to CD Radio's request to forward new documents and rejecting DSBC's virtually identical request, the Commission is treating parties with identical interests in this proceeding in a disparate and discriminatory manner. DSBC has expended considerable time, money and resources in its efforts to bring DARS services to the U.S. public and, as such, has as much at stake in the outcome of the peer review panel's analysis as does CD Radio.

DSBC's September 13 letter and the accompanying declaration are highly relevant to any decision by the peer review panel and the Commission with respect to a pioneer's preference. The Commission's decision to forward to the panel all the documents requested by CD Radio -- including those not previously part of the record, which the Commission draws attention to by discussing their weight in the cover letter - - while refusing DSBC's virtually identical request to forward documents, gravely concerns DSBC. Indeed, it calls into question the validity of any peer review panel recommendation, as well as the Commission's ultimate decision, on this issue.

³ CD Radio Letter at 3.

⁴ CD Radio's September 17 letter also contains statements that are, at best, misleading and, at times, flatly incorrect. For example, CD Radio states that "[a]t no time in this process did any party file in opposition to any of the SDARS applications for pioneer's preference." CD Radio Letter at 1. In fact, as evidenced at pages 25-34 of item 12 of the record forwarded to the panel, DSBC did file in opposition to CD Radio's request. CD Radio further states that "[n]o parties objected or even commented in response" to its March 1996 filing, suggesting other parties had no concerns with it. In fact, DSBC (and probably others) were unaware of that filing because, as with its September 13 request, CD Radio did not serve any other parties.

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We write, therefore, to urge you respectfully to reconsider your action and forward to the panel all of the documents requested in DSBC's September 13 letter.

Very truly yours,



Diane S. Killory



Cheryl A. Tritt

Counsel for Digital Satellite
Broadcasting Corporation

cc: William F. Caton, Secretary
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